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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ZOYA SOSINOV,

Plaintiff and Respondent,

v.

RADIOSHACK CORPORATION,

Defendant and Respondent;

STEVEN BITTER,

Movant and Appellant.

B235341

(Los Angeles County
Super. Ct. No. BC449675)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Gregory W. Alarcon, Judge. Affirmed.

Franceschi Law Corporation, Ernest J. Franceschi, Jr., for Movant and Appellant.

Morgan, Lewis & Bockius, Joseph Duffy, Joseph H. Bias for Defendant and Respondent.

Weiss & Lurie, Jordan L. Lurie, Zev B. Zysman for Plaintiff and Respondent.

The trial court denied Steven Bitter's motion to intervene in a pending class action lawsuit. (Code Civ. Proc., § 387.)¹ The ruling was not an abuse of discretion. Appellant Bitter failed to carry his burden of showing that plaintiff and her attorney are unable to represent him in the lawsuit, nor has he shown that his interest outweighs the existing parties' opposition to his intervention.

FACTS

In November 2010, plaintiff Zoya Sosinov filed a lawsuit against defendant RadioShack Corporation, on behalf of herself and all others similarly situated. Sosinov alleges that when she purchased a product at one of defendant's stores in March 2010, using a credit card, an employee asked for "personal identification information" in the form of Sosinov's e-mail address. Believing it was required, Sosinov disclosed the information, which was entered into RadioShack's computer. Sosinov contends that RadioShack's request for personal information during a credit card transaction violates the Song-Beverly Credit Card Act of 1971. (Civ. Code, § 1747 et seq.) Violation of this law results in penalties of \$250 for a first offense and \$1,000 for each subsequent offense.

Appellant alleges that he purchased an electronic device at RadioShack in February 2011, using a credit card. The store clerk requested appellant's personal information (name, address, telephone number) and when questioned, told appellant that the store's computer system would not complete the transaction unless identifying information was entered. A few days later, appellant filed a class action in federal district court, alleging a violation of the Song-Beverly Act. The federal court granted RadioShack's motion to stay appellant's action, due to the pendency of the Sosinov lawsuit. In its order, the federal court noted that "the claim brought against Defendant in the Sosinov action is identical to the one alleged here." In May 2011, appellant filed a motion to intervene in Sosinov's lawsuit.

¹ All undesignated statutory references in this opinion are to the Code of Civil Procedure.

Appellant argued below that he has the right to intervene in Sosinov's lawsuit because his claims "provide a more comprehensive basis for class-wide relief." Specifically, RadioShack asked appellant for his address and telephone number, whereas Sosinov was asked for an e-mail address. Appellant maintained that his claim "significantly strengthens the overall action against the Defendant and tends to undermine the defense claim that the violations were not intentional and/or resulted from a bonafide [*sic*] error notwithstanding Defendant's maintenance of procedures reasonably adopted to avoid that error." Appellant observed that he promptly moved to intervene in Sosinov's lawsuit.

Sosinov and RadioShack opposed appellant's motion to intervene. Sosinov argued that she adequately represents appellant's interests and her lawsuit was first in time. Moreover, the dispute was in mediation, so appellant's intervention would be disruptive. Sosinov noted that appellant could opt out of any settlement and pursue his case in federal court. Appellant responded that Sosinov's claims "are not sufficiently typical" to make her an adequate representative of the class. Appellant also argued that permissive intervention should be allowed because there was no undue delay and his participation would bolster the adequacy of the representation.

THE TRIAL COURT'S RULING

The trial court found that appellant is not entitled to intervene because, as a putative class member, his interest in suing RadioShack is adequately represented by Sosinov. Appellant "makes no attempt whatsoever to show that his interests are not protected by Sosinov," whose claims are identical to his. In addition, there is no indication that Sosinov's attorney cannot protect the interests of the class. The court denied appellant's motion to intervene.

DISCUSSION

1. Appeal and Review

An order denying a request to intervene in pending litigation is appealable because it is a final determination of the moving party's right to participate in the litigation.

(*Dollenmayer v. Pryor* (1906) 150 Cal. 1, 3; *People v. City of Long Beach* (1960) 183

Cal.App.2d 271, 273.) Though the statute permitting third party intervention is liberally construed, the trial court exercises broad discretion. (*City of Malibu v. California Coastal Com.* (2005) 128 Cal.App.4th 897, 902; *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 109.) The court’s ruling cannot be disturbed unless there was a miscarriage of justice. (*City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1036.)

2. Denial of Appellant’s Motion to Intervene

The right to intervene is purely statutory, and by no means absolute. Rather, the ultimate decision rests in the sound discretion of the trial court. (*Muller v. Robinson* (1959) 174 Cal.App.2d 511, 515; *Hausmann v. Farmers Ins. Exchange* (1963) 213 Cal.App.2d 611, 616.) Section 387 authorizes both mandatory and permissive intervention by nonparties.

a. Mandatory Intervention

A right to intervene exists if the person seeking intervention demonstrates (1) an interest in a pending action, (2) that interest may be impaired or impeded by resolution of the pending action, (3) “unless that person’s interest is adequately represented by existing parties” (§ 387, subd. (b).)² In short, ““an intervenor of right has by definition . . . an interest at stake which the other parties will not fully protect, and which the intervenor can fully protect only [by] joining the litigation.”” (*Siena Court Homeowners Assn. v. Grass Valley Corp.* (2008) 164 Cal.App.4th 1416, 1424.)

Appellant argues that intervention is mandatory because he is “a necessary party who has a significant interest in the subject matter of the controversy” and has submitted a proposed complaint-in-intervention. It is true that appellant’s interests are aligned with Sosinov’s interests. Indeed, appellant is a putative member of the class that Sosinov

² The statute reads, “If any provision of law confers an unconditional right to intervene or if the person seeking intervention claims an interest relating to the property or transaction which is the subject of the action and that person is so situated that the disposition of the action may as a practical matter impair or impede that person’s ability to protect that interest, unless that person’s interest is adequately represented by existing parties, the court shall, upon timely application, permit that person to intervene.”

seeks to certify. Yet appellant cites no authority for the proposition that a putative class member is a necessary party with an unconditional right to intervene, particularly when appellant's interest is identical to that of the rest of the class.

This Court has acknowledged that section 387 does “*permit* one of the class in behalf of which the suit has been brought by a plaintiff to intervene therein.” (*Mann v. Superior Court* (1942) 53 Cal.App.2d 272, 280, italics added.) That is to say, intervention is discretionary, not mandatory. Even if allowed to intervene, the existing plaintiff—not the intervenor—must “dominate and control the suit to its conclusion, unfettered by the views of the interveners, save and except where it is shown to the court that the action is not being prosecuted to the best interests” of the class members. (*Ibid.*)³

Apart from demonstrating a significant interest in the litigation, an intervenor carries the burden of showing an impairment of his interest and the plaintiff's inadequacies. (*People v. Brophy* (1942) 49 Cal.App.2d 15, 34.) Appellant has not shown that Sosinov will be unable to present appellant's \$250 claim arising from RadioShack's request for his identifying information during a credit card purchase. Ignoring *Brophy*, he improperly attempts to shift the burden to show adequacy onto Sosinov. The existence of minor differences between appellant's claim and Sosinov's claim is not enough to establish Sosinov's inadequacy, given that the alleged improprieties arise under the same statute and involve the same defendant.

b. Permissive Intervention

Under the permissive subdivision, a person “who has an interest in the litigation, or in the success of either of the parties, or an interest against both” may seek to intervene in the action. (§ 387, subd. (a).) The court may permit intervention if the intervenor has a direct and immediate interest in the litigation; the intervention will not enlarge the

³ Counsel for an intervenor cannot participate in the action without the consent of plaintiff's counsel or the court, and is not entitled to a fee out of any recovery that ensues, absent a distinct contribution to the outcome that plaintiff's counsel could not have made. (*Mann v. Superior Court, supra*, 53 Cal.App.2d at pp. 280-281.)

issues in the case; and the reasons for intervention outweigh any opposition by the existing parties. (*City of Malibu v. California Coastal Com.*, *supra*, 128 Cal.App.4th at p. 902; *Truck Ins. Exchange v. Superior Court* (1997) 60 Cal.App.4th 342, 346.) “The permissive intervention statute balances the interests of others who will be affected by the judgment against the interests of the original parties in pursuing their litigation unburdened by others.” (*City and County of San Francisco v. State of California*, *supra*, 128 Cal.App.4th at p. 1036; *County of San Bernardino v. Harsh California Corp.* (1959) 52 Cal.2d 341, 346.)

Appellant continues to argue that the burden of showing adequacy falls upon Sosinov. Appellant relies on inapposite cases relating to court hearings to obtain class certification, but this is not a class certification proceeding. On a motion to intervene, appellant has the burden of proof. (*People v. Brophy*, *supra*, 49 Cal.App.2d at p. 34 [“The burden rests upon the one seeking to intervene to show that his is a proper case for intervention”].) Appellant fails to make the necessary showing that this is a proper case for intervention. Merely making a request to intervene early in the litigation process is not, in itself, a sufficient reason to outweigh the opposition to intervention voiced by the existing parties to the lawsuit.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.